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LAW AS AN INSTRUMENT AND MEASURE OF SOCIAL PROGRESS.*

My initial duty is to convey to the authorities of the University my profound thanks for extending to me the invitation to deliver this lecture under a foundation associated with the name of a great ruler respected thoughout the whole of India. Though the stress and strain of professional work and my official duties leave me very little time for the pursuit of an academic study of law, I have hazarded this undertaking mainly because I have come more and more to realise the need for the approach of the study of law from a sociological point of view and the need to impress upon my younger friends in the profession the importance of such a study. In delivering the address on the topic of Law as an instrument and measure of social progress, I need hardly say I make no pretensions to any originality as my lecture is largely based upon a study of the leading writers on Jurisprudence and legislation and such experience as I have gathered in the practice of the profession. In the short time at my disposal I can only touch on the fringe of many a topic calling for a detailed and fuller treatment. If to the student of zoology the growth of life in different forms is of absorbing interest, if to the sociologist the development of society from rudimentary beginnings has a fascination and if the growth of the nation State, the need for the federation of communities and the growth of international unions make a powerful appeal to the student of history and politics, the inter-relation between law and society—law stimulating and bettering the growth of civic society and individual life and a changing society in its turn shaping legal institutions—has a peculiar attraction for the lawyer and a student of historical jurispru-

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dence. The legal world is under an immeasurable debt of gratitude to the great analytical, historical and sociological jurists who have rendered incalculable service in the promotion of a scientific knowledge of the subject. The one important lesson that is learnt by the lawyer in the course of his studies is that the source of all law is to be found in the seething life of the people, that the course of legal development is determined by the progress attained by the nation in the several spheres and that the legal system in its turn has shaped progress. While law may, to some extent, be the result of the sociological forces operating in any civilized society, it is beginning to be realised more and more that social progress may also be controlled and regulated, and law can be made a more efficient instrument for individual and social well-being, through conscious effort. It is a familiar experience to every lawyer that sometimes a new rule of law enunciated by a Court may work a thorough metamorphosis and give a new direction to social progress even to the extent a scientific invention may sometimes make and has made a new world of our planet. Decisions of Courts have set standards as to the degree of care required in dealing with one's own property and the degree of care required of a person to whom the management of another's property is entrusted, as to the point of approach in dealing with, say, the problem of contributory negligence, as to what constitutes an actionable nuisance in the changed conditions of town and country life, as to the limits of liability of corporate and public bodies for nonfeasance and misfeasance and even as to the standard of honour required in the pursuit of a profession. Is there any doubt that in the approach to such questions the Court is to take into account the social forces at work at a given time? The standards themselves are variable in their nature and content. The development of the law of wrongs in the complex conditions of modern society is a striking illustration of the working of the above rule. Social dynamics is not a constant factor, as the principles of reason, morality and social utility, on which all law rests, can no more be static than society itself. As recent decisions have shown, even such a question as the liability, say, of a hospital authority for the negligence of a surgeon employed in a hospital under public control cannot be decided as an abstract legal question. It is largely the balancing of social considerations that will determine the issue whether the proper

analogy to be applied to the case is that of the liability of a master for the wrongs of his servants or that of a public authority whose only duty is to choose a skilled doctor. The hardening of institutions into a shell, as Bagehot and Maine have illustrated, is the greatest hindrance to life. The functional approach to the study of legal problems has received special attention in America in recent times. Maitland and Holmes—two of the greatest names in Anglo-American Jurisprudence—owe not a little of their juristic eminence to the sociological method of approach to legal problems. In his book on "The Nature of Judicial Process" Justice Cardozo has also described the great transformation in the legal view of property and liberty in the latter part of the 19th century and more so in postwar Europe and America and the reactions of the sociological school of jurisprudence to the changed conceptions of property and rights. In the process of adjusting law to the changing conditions of society or of law shaping and helping social change, there is bound to be frequent maladjustment as the law of social dynamics cannot by its very nature be exact.

With your leave may I attempt a very brief survey of the history of law and legal institutions from this standpoint? One may start with the traditional sources of law according to the classification of jurists in the pre-legislative period—custom, *responsa prudentum* of jurists, and judicial precedent. Without going into the academic controversy connected with the nature of customary law, whether custom had its origin even prior to the evolution of the modern State, whether customary law is traceable to the practices of the elite or the select section of the people and was unconsciously adopted by the rest, whether in the later stages of its growth it had a sanction of its own or whether its sanction as law depended on the enforcement by the duly constituted tribunals in the State, there can be no doubt that customary law, while it may have a sociological origin, has been largely shaped by jurists and judges—it may be by jurists under the ancient Roman and Hindu Law; it may be by judges under the English system of jurisprudence. The skilled interpreter has largely moulded customary law, much like a potter moulding clay or any plastic material in his hand. That does not of course involve that the interpreter is working in a vacuum. He has necessarily to work in the surrounding atmosphere and with the material that is available. At the minimum he gives a new

direction to the forces at work. There may be no difficulty in tracing what may be termed 'a rule of customary law' to the influence of a jurist or a particular judge. One cannot pass over this topic without alluding to the great part played by the commentators in Hindu Jurisprudence.

It does not require a deep knowledge of Sanskrit literature to realise the great changes effected in the law of the Smritis by the commentators. Even a cursory perusal of the different commentaries in the available translations will convince a reader of the dexterous skill displayed by the interpreters in moulding law and custom to suit the tendencies of the age and of the particular tract of country to which a law has to be applied. The result may have been achieved in various ways—sometimes by insistence on a literal reading of the original Smriti text, sometimes by emphasising the religious principle involved in a particular rule, and sometimes by the very opposite process of stressing the secular aspect of the right involved. It not infrequently happens that the whole conclusion of the commentator occasionally rests upon a philological dissection of an ancient Sanskrit verse or text. Who can ever decide the extent to which the commentator was influenced by the social forces at work in the particular age or how the social tendencies were in their turn moulded and given shape to by the ingenuity of the commentator. Those were days when the springs of civilized life were in active operation in Hindu society and were not dried up.

I shall now take up the second main source *viz*. judge-made law. The most forcible and erudite exposition of this topic is found in Professor Allen's book on "Law in the making." In English jurisprudence, the judge occupies very much the same place, as has been frequently pointed out, as the professional jurist in the early history of Roman jurisprudence and the commentator in the Hindu system. The English law, as is well known, is largely judge-made law and in the field of what may be termed "private and personal law," continues to be so even at the present day, excepting to the extent modified by recent statutes, as a result of the labours of the Law reform committee; constituted with a view to remove certain anachronisms and anomalies of English law entirely out of tune with modern conditions. While the English system of jurisprudence has been the theme of unstinted and incessant praise generally by

English lawyers, it is common knowledge that it has been subjected to a good deal of adverse criticism not merely by foreign jurists but by the reforming school in England from the days of Jeremy Bentham. On the one hand it is urged with a feeling of pride that the English system stands as a vindication of the pre-eminent and rooted sense of justice of Englishmen and that it has stood the great changes in English society after the Industrial Revolution and even in the post-war period. On the other hand, the defects of the English system have been catalogued with equal vehemence and earnestness. One chief characteristic of the English system is the binding character of precedents, graded according to the relative position occupied by the Courts in the judicial hierarchy, though, as is pointed out by Professor Allen, it did not become an established principle of English law, until about the middle of the 19th century, and was not so even during the days of Lord Mansfield. The most interesting question for a student of legal institutions is how the elasticity of the law has been maintained, consistent with the principle as to the binding nature of a judicial precedent, and how English law has been moulded by the judges to suit the needs of a growing and expanding civilization. Sir Frederic Pollock did not make an exaggerated claim for the Common law when he stated that it was capable of growing to the demands of the new times and circumstances, and that its conclusions in detail were not dogmas but flexible applications of living and expanding principles. The theory of the binding nature of judicial precedents has been got over in countries permeated by English jurisprudence, as every practising lawyer knows, by recourse to various expedients, by the rule that an *obiter dictum* is not binding but only its ratio, by limiting the scope of the decision to the facts in the particular case, by curtailing the operation and scope of a decision as a result of a meticulous examination of its content and reasoning, by the enunciation of the principle that a case is an authority for the actual point decided, by grading the relative authority of particular tribunals and sometimes by the rule that a decision must be reported in certain authorised publications, and so on and so on. The history of English law for the last 50 years and over has shown that these methods have not ceased to be unsuccessful and still continue to be fruitful, and that in spite of a vast growth of precedents, there is still room for judicial expansion.

of the law and the formulation of new principles. Nowhere is this tendency more noticeable than in the recent developments in the law of torts and also in certain departments of the law of contracts. The law as to public bodies and the law of conspiracy in its different aspects have opened up a new chapter in English law. Even on such a subject as the liability of a seller for the quality of the articles sold not merely to the immediate buyer but to successive buyers, there has been a vital change consequent on the present day conditions of modern society and the rapid passing of an article from hand to hand. An accepted theory like a corporation under the English law being a juristic personality is undergoing a change for some purposes. In the region of Income-tax law, in dealing with Foreign corporations under certain circumstances, there is an attempt to break through the conception of the theory of the juristic personality of a corporation for all purposes.

Without in any way minimising the claims made by English lawyers, one may easily group the apparent disadvantages. Under the English system, a wrong principle enunciated a hundred years ago in what may be termed a chance decision without any regard to principle or without any ratiocination may easily entrench itself as not being open to attack. The rule as to the doctrine of common employment is a glaring instance in point, though the other day the House of Lords, reversing a decision of the Court of Appeal, circumscribed the doctrine within the narrowest limit with due regard to the changed conditions in modern industry and the absence of any kind of link between an employee in one sphere and an employee in another sphere of a large business organisation. There are other stereotyped rules of a similar character which have no essential basis in the fundamental principles of justice and fair play. Compare (1) the rule as to *actio personalis*, (2) the law relating to married women, (3) the doctrine relating to common employment, and (4) the rights of third parties to contracts.

Some of these archaic principles have either been totally abrogated or modified by recent legislation.

Again, whereas certainty is the very soul of law, the English system may easily lead to an uncertainty in the determination of law, necessitating as it does a trained practitioner to wade through a whole mass of Case-law to ascertain a simple rule of

law or conduct it may be. It has also been urged against the English system that of necessity it makes the administration of justice a most expensive affair to the litigant whereas the pre-eminent consideration to be borne in mind in regard to any legal system is the expeditious and cheap remedy it affords for the redress of wrongs. The criticism has also been expressed by Professor Laski and others of his school—a criticism in which I do not share—that the judiciary in England, while maintaining a high standard of independence, has not been altogether free at any rate from unconscious class bias, due, it may be, to the recruitment of the judiciary from the middle and the higher classes trained in particular schools of thought. The decisions on the Workmen's Compensation Act and on Trade Union Law are instances cited in support of this criticism.

Without going into the merits of the criticisms against the system of judge-made law, it may be of interest to note that the discontent with the existing judicial technique, a dissatisfaction of being tied to judicial precedents and a growing impatience with the existing order, have led to the rise of a new school, especially in America, the jurisprudence of which is similar to the English jurisprudence. The main theme of this school is to free law from the trammels of judicial precedents, the cardinal principle of this school being that the proper functioning of a rule is its only title deed to recognition and nothing else. It is impossible to subscribe in its entirety to the views of this school as that may lead to a sacrifice of all rules of certainty and would leave the fate of litigants entirely in the hands of an individual Judge or Judges. Some of the greatest American Judges in recent times, such as Holmes, Cardozo, Brandies and Jurists like Maitland in England have been largely influenced by this school, though they would not subscribe to the extreme view of countenancing a law for each case. Without sacrificing the rule as to certainty being a cardinal principle in the administration of justice and conceding that a precedent is a starting point to work from, these jurists are for the highest Court in the land at any rate abrogating a principle when the same is unsuited to the times or when a precedent is proved to be radically unsound and indefensible. The theory of the absolute in law has no attraction for these jurists. If a Judge cannot consciously assume the role of a legislator, neither can he consciously or unconsciously ally himself to a particular economic

or social order and arrest the growing currents of active social life. It may be of interest to note that there is nothing very surprising in the attitude of this school or even of the realist school, if only one remembers, as is pointed out by Professor Frankfurter now Mr. Justice Frankfurter in his recent book on Holmes, the work of Lord Mansfield in the formative period of English commercial law. As he says there is high authority to support the view that Lord Mansfield in assimilating the long-established custom of merchants into English commercial law wrought havoc with symmetry: "He earned no doubt the reputation of being dangerous to the kingdom but imbued the Common law with a vitality for which it has reason to be grateful."

While on the subject of judge-made law I have not alluded to the part played by the judiciary in the shaping of the federal constitution or the multiple State. A federal system necessarily involves the institution of a complicated machinery of government which demands the most delicate and flexible adjustment for harmonising the interests of national and provincial or State governments. Federalism itself is a form of government of varying content. In the delicate task of constitutional adjustment, the Courts under the British and American systems, even if not under certain Continental constitutions, have a very important part to play. The best illustration of this statement is found in the American system on account of the long history of the American democracy. One need not wade through the maze of sometimes apparently conflicting decisions of the Supreme Court of the United States, say, on the commerce and the due process clause of the American constitution to come to a conclusion that the delicate task of harmonising national and State interests, of individual liberty and the rightful sphere of the intervention of government has, on the whole, in the different periods of history, been discharged in a unique manner by the Court, criticisms to the contrary notwithstanding. In the hands of the Court: "the constitution has become a plastic instrument to be adapted to a growing nationalism." As a recent writer puts it, "the constitutional document has been in the various pronouncements of the Court examined as critically and minutely as though it were verbally inspired." "No doctrinal confession in a church has suffered such a metamorphosis in meaning combined with an unimpaired respect for

the letter as the fundamental law of the American constitution." In the result, a constitution which was designed when it was framed to serve the interests of an agricultural country with a population of 3 millions has wonderfully reacted to the changed conditions of American democracy in an industrial epoch and to an age which is profoundly affecting the relationship between the State and the individual and *vice versa*. That is a great tribute both to the fathers of the American constitution and to the work of the American judiciary. It looked as if the other day during the post-war economic crisis the constitution was about to give way but the catastrophe has been averted and there has been a fresh accession of strength to the Supreme Court.

In evaluating the work of the Court, it is not as if I have not taken into account the criticisms that have been levelled against its work, its oscillations of opinion with a change of personnel in the Court, its sometimes ranging itself, as it is stated, with the forces of reaction, sometimes appearing to espouse American nationalism and sometimes state particularism, but giving full weight to these criticisms the verdict has to be on the whole in favour of the Court, which has functioned for nearly a century and a half and the claim made by President Wilson that the fundamental instrument is in the nature of a tap root from which has grown a constitutional system is largely due to the work of the Court. Similar influence of judicial interpretation is seen in the evolution of Dominion constitutions. Though the Judicial Committee has not subscribed to certain rules of interpretation which the Supreme Court of the United States has laid down, it is common knowledge that, as a result of the interpretation put by the Judicial Committee on the British North America Act, the constitution of Canada to-day has assumed in several respects a form different from what was expected or intended at the time. If to-day the Canadian Provincial Governments are not merely local governmental units but are in the position of States exercising what may be termed sovereign functions for this purpose, it is not a little due to the decisions of the Judicial Committee. Owing largely to the growth of nationalist feeling in Canada and a sense of its new-born status under the Statute of Westminster and the recent developments in Dominion autonomy, discontent has been expressed in several quarters with some of the decisions of

the Judicial Committee. But that does not in any way affect the substance of my remarks.

Similar observations apply to the work of the High Court of Australia which is the final Court of Appeal in constitutional matters except when special leave is granted by the High Court which is seldom given. As a result of the work of the High Court of Australia, the constitutional balance has shifted from the States to the Centre in several respects contrary to the expectations of those concerned in the framing of the constitution. The diffusion of political power in a federal state is a major issue of politics at the present day, which may render a large scale economic reform difficult, if the Centre and the Provinces in India do not work in harmony with a single eye to national prosperity and consolidation. At the same time, as is pointed out in a recent book, federalism may afford a guarantee against the emergence of the totalitarian State. The success of a federal scheme, as I have already pointed out, would, to a very large extent, depend upon a co-operation between the Centre and the units, the prevention of unhealthy rivalry among the units themselves and the vesting of an overriding power in a responsible national government at the Centre in times of emergency.

By far the most important source of law in the present era is legislation. An ever increasing legislative activity is a special feature of the modern State, whatever be the form of government obtaining in the particular polity. According to a recent estimate, the output of legislation in the post-war period in England exceeds the output of legislation in the 19th century, and is far in excess of the legislative activity of the State in the centuries that preceded it. It is a common place of politics to state that the political ideal of the age and the prevalent social and economic tendencies give the necessary direction to the course of legislation. While it is true that in Europe the introduction of democratic government was, in the early stages, strangely enough, followed up by an emphasis upon the doctrine of laissez-faire in politics, very soon it came to be realised that laissez-faire could not be a sound working rule in a democratic polity, as, naturally, the enfranchised masses began to press for the betterment of their social and economic conditions. The movement towards social amelioration is a necessary concomitant of the democratic movement. In spite of the fact that English

democracy is averse to effecting any convulsive changes in society, it is common knowledge that there has been "path-breaking" industrial legislation in England which made her the pioneer of industrial law, whose example has been followed in every other country. Even a cursory glance at the statute-book will reveal that legislation regulating the conduct of industry and agriculture is expanding enormously in volume and growing in complexity, and, in accordance with modern trends, there are a large number of statutes modifying in various degrees freedom of contract. As the Lord Chief Justice of England put it in a recent case, referring to the Factory and Workshop Acts, "A large purpose of these statutes was to save workmen from themselves." There is no school of politics which does not recognise at the present day the right of the State to intervene to regulate competition, to prevent exploitation, and to exercise control over working conditions. Even avowed exponents of individual liberty and property have come to realise the need for "the State checking the blind results upon the many, of economic actions which are undertaken for gain by the few, and the legitimacy of the demand for a strong government to control economic forces with the object of giving the many, economic security." A recognition of the growing functions of the State and of the regulation of economic conditions as a part of the accepted philosophy of government necessarily lead to the devolution of governmental functions upon administrative bodies and agencies under the authority of Government created for the purpose. This delegation, as is pointed out by Mr. Wade in his recent edition of Dicey, is not confined to government departments but extends to numerous statutory departments which cannot be regarded as departments of State directly responsible to the legislature.

In spite of the criticisms levelled against administrative and legislative delegation, the report of the Donoughmore Committee reveals that recent tendencies in legislative methods are inevitable and are bound to grow. All that can be expected is to give a proper direction to such methods and practices. In regard to administrative bodies exercising quasi-judicial functions, while the highest court in the land has necessarily to exercise a restraining influence to see that these bodies do not overstep their jurisdiction in the interests of sound and efficient administration, the bodies themselves will have to be given a latitude and

freedom of action without any sacrifice of the fundamental principles of justice. While legislation in any modern State necessarily involves a certain degree of interference with even what may be termed 'liberty of person' in the larger sense of that expression, care has to be taken that the foundations of such liberty are not sapped.

Even the United States, whose constitution is based on the 18th century notions of individual property and sanctity of contract, have not been able to resist the tendencies of the age. The New Deal legislation has been actuated by the guiding principle of a pervasive governmental interference with all branches of private business. The legislative activity of the State has invaded every sphere—the reduction of private debt under the moratorium legislation, the inflation of currency, the banking system, and agricultural and industrial production. The need has been recognised for finding a rational compromise between individual rights, and public welfare, the security of the State being placed by every section of political opinion above the security of vested rights. There is an increasing realisation of the necessity of the laws being every day adjusted to a new environment and even the constitution being so interpreted as to meet economic realities.

The growing tendencies in England cannot but have their reactions on the Indian scheme of government. In spite of the essentially individualistic and family basis of Indian social organisation and the village-community system of local Government, from very early times, the State in India has taken upon itself the functions assumed by the modern State in European countries. In illustration of the above statement, I would only refer to such matters as irrigation, control of communal property, forests, and regulation of land revenue. Legislative interference for regulating and adjusting the different interests which have grown up in the land in the course of centuries has been a special feature of British Indian Administration. The democratic legislatures of India under the new constitution are confronted with the problem of large-scale legislation in regard to these matters. While the interests of agriculture, as the staple source of living for the large mass of people in this country, will have to be safeguarded and fostered, and while every effort has to be made also to help the cottage industries in villages and in the suburbs of towns, this country cannot be expected to keep pace

with the civilized world, sustain its growing population and ensure a proper standard of living for it, unless every endeavour is made to help large-scale industrial enterprise of various kinds. A large-scale industry in industrial centres cannot but bring in its train the problem of adjustment of the relations between capital and labour according to modern ideas, the prevention of overcrowding and the ensuring of sanitary surroundings. The task before the legislator dealing with industrial problems is how to harmonise the interests of capital and labour and secure a fair deal for the labourer without destroying initiative and enterprise. In the process, the key industries of the country must necessarily come under the control of the State, if not under its direct management.

Meanwhile, the constitution itself is in the melting pot and the determination of legislative spheres takes up a good portion of the time and energy of the best minds in the country. The problems that await solution call for the exercise of the wisest statesmanship. They cannot be solved by dilating on *a priori* theories borrowed from the West or antiquarian researches into the state of society in ancient and mediæval India. There is no use of a too rigid insistence on sanctity of contract or inviolability of property. Nor will slogans copied from books which have no relation to the concrete facts of the Indian situation which may result in strife, discord and misery of millions, do any good. The politician, the lawyer, and the average citizen will have to strive for a new social harmony.

In the foregoing remarks I have not made any special reference to the need for change in the personal law of the Hindus, as the reform of Hindu Law including the law relating to women's rights, is merely a part of the larger problem of social and legislative changes. I am aware that in this matter your State has set an example, in many respects forestalling British Indian Provinces. The process of change by textual interpretation by commentaries of acknowledged authority is no longer available, as that source is, of necessity, dried up under modern conditions. The process of change by judicial construction is still available to some extent, but the very nature of judicial process, as has already been pointed out, imposes obvious limitations on the expansion and adaptation of the law. It must be admitted that in several branches of Hindu Law, the Judicial Committee and the Indian High Courts have recently given a

proper direction to the development of Hindu Law, though now and then there have been decisions which have taken the profession and the public by surprise. Piecemeal legislation has in glaring instances set right some rules of law out of tune with modern conditions and the social consciousness of the people, though such legislation has occasionally resulted in making parts of Hindu Law an unintelligible jumble. A wholesale and radical change in the very concepts of Hindu Law is demanded by one school of social and legal reformers while another set is strongly opposed to any kind of legal change, though they easily reconcile themselves to even a chance decision revolutionising or making a serious inroad on our notions of the law.

Well-instructed opinion is decidedly in favour of changes in the joint family law in the interests of the growing commercial needs of the country, while, at the same time realising that in the larger interests of agriculture unless group property of some kind is recognized there may be total dismemberment of property and fragmentation of holdings in the villages. In any reform of Hindu Law, the interests of rural economy cannot of course be ignored.

The time also seems to be ripe for a codification of the Hindu Law of Succession on rational lines and on an intelligible basis without the Courts having to go through the process of calculating pindas which are never offered or a calculation of the particles of blood with reference to certain artificial rules laid down by our forefathers.

The law of adoption may be easily simplified without the lawyer having to dissect the pronouncements or dicta of the Judicial Committee in different cases on the problem of the nature of sapinda consent that is required for a valid adoption or the limits for the due execution of an authority to adopt.

The law as to the obligation of the different members of the family in regard to debts is still in an uncertain state and makes the task of the legislator working in new fields of social and economic reform exceedingly difficult.

The Indian law of procedure and limitation occupies too much attention of the Courts and a good deal of public time is wasted in unravelling a rule of procedure or the true import of a particular article of the Limitation Act. Procedure is intended to facilitate and ensure the administration of justice on sound principles and the law of limitation is similarly intended

to prevent agitation of stale claims. When the earlier Codes of Civil Procedure were enacted, they were mainly intended to assist Indian Courts with ready-made and detailed rules in the conduct of trials with due regard to certain fundamental principles in the administration of justice according to British ideas. When the Code of 1882 was repealed and that of 1908 was enacted, a serious attempt was made to differentiate between what might be regarded as principles of procedure, which were embodied in the main sections of the Code, and certain other provisions of a less important character which were relegated to the schedule and the rules portion of the Code which might be altered by the different High Courts in India. It was hoped that a certain elasticity of procedure could or would be secured by recourse to this machinery. But the experience of the working of the Code for the last 30 years has shown that the hopes of those responsible for the Code of 1908 have not been realised to the extent anticipated. Litigation involving pure questions of procedure has not, to any appreciable extent, diminished, and the number of decisions on such questions is decidedly on the increase. It does not require a detailed investigation to come to the conclusion that the number of decisions in the English Law Reports on pure questions of procedure bears no proportion whatever to the vast mass of Case law on procedure in India.

The Indian law of limitation is another subject which may well occupy the attention of the law reformer. When the Limitation Act was arranged into sections and articles laying down the starting point of limitation and different periods of limitation for various kinds of suits and applications, it was hoped that the Act would furnish ready-made answers to mofussil courts dealing with questions of limitation, and that the enactment would prevent the agitation of stale claims by litigants. The hopes have been baffled and the arraignment has only served to encumber the Law Reports and increase their size and volume. Experience of the working of the Limitation Acts of 1871, 1877 and 1908 makes one feel that possibly a Limitation Act on the lines of the Act of 1859 and the English Limitation Acts is more likely to achieve the objects of a proper limitation law than a too detailed enactment of the kind similar to the Indian statute. It is easy enough to get into a groove but very difficult to get out of it. Anyhow, it

ought to be possible for the law reformer to devise a simpler Code of Procedure or rules of limitation without in any way sacrificing the paramount interests of justice.

The law of evidence in force in British India, while resting on pre-eminently sound principles, is too antiquated and is capable of being improved in the light of recent developments in England. There is no reason also why an easily understood procedure should not take the place of ancient writs, as has been done in England, without in any way sacrificing the true spirit and principle underlying these writs.

To carry out all these reforms, it is necessary to infuse a new spirit in the lawyers and legislators—lawyers, who think not in terms merely of reported decisions and antiquated rules of a bygone age but in terms of a living and progressive society, and legislators with a sociological bent of mind. There must be a standing committee in every law association which would approach the study of these problems in a broad and catholic spirit and which would make suggestions as to legal changes. The Government, in their turn, ought to invite the sympathetic co-operation of the Profession. That, of course, does not involve that the Government are to sacrifice the interests of the public or the fundamental and ultimate aims of the party which, for the time being, is in power under a democratic form of Government.

SUMMARY OF ENGLISH CASES.

ROBERTSON *v.* PETROS M. NOMIKOS, LTD., (1939) A.C. 371 (H.L.).

Marine Insurance—Insurance on hull and freight—Damage to ship before charter voyage due to fire—Ship repaired and insurance as on partial loss claimed—Charterparty not performed—Claim on insurance on freight as on constructive total loss—Maintainability.

A marine insurance policy was for "4110*l.* on freight chartered or otherwise in and/or over" and was a time policy for twelve months. It was expressed to be subject to the Institute Time Clauses—Freight, which were set out in a slip attached to the policy. It also incorporated the hull and machinery policies. The vessel was chartered to a Belgium Company to load a cargo of crude oil for ports in the United Kingdom. While repairs were being executed before the starting in ballast on the voyage, there was an explosion on board followed by a fire resulting in damage. The owners had the ship

repaired and claimed for partial loss up to the full insured value of 28,000*l.* for it. The charterparty was never performed; and the shipowners claimed under the freight clauses from the insurers the full freight as on a constructive total loss. The insurers contended (1) that there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners who on the contrary had elected to retain the vessel and claim as for partial loss and (2) that the claim was excluded as being consequent on loss of time because the repairs took so long as to make it impossible to perform the charter party.

Held (on a construction of S. 61 of the Marine Insurance Act, 1906), that there was a constructive total loss and the shipowner was entitled to the amounts claimed.

(1938) 2 K.B. 603, affirmed.

PRATT *v.* PRATT, (1939) A.C. 417 (H.L.).

Divorce—Desertion—Refusal by deserted spouse to allow a meeting to discuss resumption of marital relation in spite of request—Effect on desertion.

Where the deserting spouse writes letters which indicate a genuine and honest desire to see and discuss matters with her husband in the hope that this would result in their "coming together" in their making "a new start" and "a home together in the future" and the husband refuses to allow a meeting to take place, her continued absence thereafter cannot without an utter misuse of language be called a desertion.

Decision of Court of Appeal in (1939) P. 117, affirmed.

FARLEY *v.* WESTMINSTER BANK, (1939) A.C. 430 (H.L.).

Wills—Gift for "parish work"—If valid charitable bequest.

A will contained a bequest to vicars and churchwardens "for parish work."

Held, "parish work" are words of such vague import as to go far beyond the ordinary meaning of charity in this case in the sense of being a religious purpose. The words are so wide that on no construction can they be brought within the limited meaning of "charitable" as used in law. The gifts therefore failed.

(1938) Ch. 482 (C.A.), affirmed.

BUCHANAN WOLLASTON'S CONVEYANCE, *In re*: CURTIS *v.* BUCHANAN WOLLASTON, (1939) 1 Ch. 738 (C.A.).

Joint tenants—Purchase of land jointly—Covenant not to sell without unanimous consent of all—Application by one to order sale—Sale if to be

ordered—Practice—Appeal—Evidence that could and ought to have been put before trial Court—If to be admitted on appeal for the first time.

Several persons who had purchased land as joint tenants entered into a mutual covenant whereby the land was not to be parted or dealt with except with the unanimous consent of all. Where one of the parties applies to the Court to order a sale, the Court will not aid that party to break his contractual obligations.

(1939) 1 Ch. 217, affirmed.

An application for admission of fresh evidence was rejected on the ground that it was evidence that could quite easily have been and ought to have been put before the Court below if it had any relevance to the appellant's case.

MACLENNAN, *In re* : FEW *v.* BYRNE, (1939) 1 Ch. 750 (C.A.).

Deeds and wills—Construction—Principles—Annuities of clear sums after deduction of income-tax—Reliefs recovered by annuitants under Income-tax Act—If to be returned to trustees of estate.

In construing documents, each word used by the settlor, or the testator, as the case may be, must be given its true and proper meaning in the context, and it is not legitimate for the purpose of construction to treat phrases used in the document as though they had been differently expressed. The precise language of the document is to be examined and the proper construction placed on it in relation to the particular subject-matter it deals with.

Under a will the testator bequeathed certain annuities each to his wife, children and wife's brother (not free of income-tax) and the residue to his wife. By a subsequent family arrangement they charged the residue of the annual income of the residuary estate (after providing for the annuities under the will) with the payment by the will trustees of " such an annual sum as together with the annuity under the will (£ 250) would (if such annual sum and annuity respectively were payable to the annuitant absolutely) after deduction of income-tax but not sur-tax leave the sum of £ 500 clear of all deductions for income-tax but not sur-tax." The annuitants were entitled to some reliefs for refund under the Income-tax Act.

Held, on a construction of the deed and will, that the reliefs to which the annuitants might become entitled under the Income-tax Act should be returned to the trustees of the estate.

In re BEALE : *Ex parte* THE BOARD OF TRADE, (1939) 1 Ch. 761.

Bankruptcy Act (1914), S. 19—Election of trustee by creditors—Trustee elected, a member of firm of accountants who had acted for debtor proving for debts for professional services—Objection to appointment.

On a receiving order against a debtor the creditors elected an accountant (a member of a firm who had acted for the debtor and was a creditor in respect of debts for professional services) as trustee. On objection taken by the Board of Trade under S. 19 (2) of the Bankruptcy Act, that because of his connection with or relation to the bankrupt or his estate it will be difficult for the proposed trustee to act with impartiality in the interests of the creditors generally.

Held, the objection must be upheld.

JOTTINGS AND CUTTINGS.

The Long Vacation.—The vacation which has now begun well merits its title of "the long," although in fact it is considerably shorter than it was not so many years ago. At one time it extended to practically three months, from 8th August to 2nd November; later it was curtailed to ten weeks from 13th August to 23rd October; while more recently it has been again abbreviated. Foreign observers have often commented adversely on its length. The Grand Duke of Weimar—Goethe's Grand Duke—in a conversation with Crabb Robinson "expressed his disapprobation of the English system of jurisprudence, which allowed lawyers to travel for months at a time," and Robinson had to admit that the Grand Duke was right. No doubt from the purely business point of view it seems highly anomalous to close the courts for so long a time, but the good sense of the English race seems early to have recognised the practical benefit of a cessation of litigation for a considerable period, and as one of the old judges, who doubtless appreciated the rest which came to him during "the long," once declared, it was absolutely essential that there should be a lengthy truce in litigious warfare to give the needed recovery from the contemplation of human nature not always at its best.—*S.J., 1939, p. 613.*

Sumneriana.—In each generation there is usually some member of the Bench who stands out in bold relief as possessing certain qualities which distinguish him from his colleagues and give him a title to remembrance which is denied to the judge, however eminent in many respects he may be, who is without that element of character or idiosyncrasy which stamps him as distinctive. To the former class of judges Baron Parke in a past day certainly belonged. That distinguished judge simply revelled in law, and nothing pained him so much as to find the record not drawn in what he considered the orthodox style; but although his decisions are still quoted and treated as authoritative, perhaps his chief title to diuturnity are the

stories which quaintly reflect his passion for law, as exemplified in the story which, if not strictly true, should be, of his taking a "beautiful demurrer" to the sick bed of a professional friend to cheer him into convalescence. Not very many of Parke's successors on the Bench have left their mark quite so distinctive as he did, but the late Lord Sumner ran him very close. Lord Haldane once described him as "a consummate lawyer"; but he was something more, possessing as he did the gift of rapid decision and the gift of expressing it in pointed language seasoned with wit.—*L.T., 1939, p. 99.*

At the Bar.—Like a good many others who were to achieve fame in the law, John Andrew Hamilton, afterwards to be ennobled with the title Lord Sumner, did not spring into professional fame all at once; but he was never idle, his pen, pointed with causticity, was busy in the columns of the now long extinct *Academy,* and later, in the writing of something like 300 articles for the Dictionary of National Biography into which he would slip a caustic comment eminently characteristic of him. In those early days he also wrote a short biography of Dan O'Connell, wherein we find this little jibe at his predecessors in the same biographical field: "O'Connell's biographers do not agree as to what Inn he studied at; his son John says Lincoln's Inn; Daunt says Gray's Inn; and Shiel, the Middle Temple. All these may be presumed to have had means of knowing the truth. Fagan follows Daunt, and Huish, Shiel; Mr. Shaw Lefevre puts him at the Inner Temple. There are no more Inns of Court." Occasionally this vein of humour would find expression even in the pleadings which came from him in his early days. Thus he was once called upon to draw a defence to an action for breach of promise of marriage. The plaintiff's statement of claim contained the usual allegations; the defendant promised to marry the plaintiff; the plaintiff was always ready and willing to marry the defendant; but the defendant refused or neglected to carry out his promise, whereby the plaintiff suffered damage in respect of which she claimed. As it came from Hamilton's hand the defence was a model of brevity, simplicity and wit. This it was: "The defendant admits that the plaintiff was always ready to marry the defendant, but save as aforesaid the defendant denies each and all of the allegations contained in the statement of claim."—*L.T., 1939, p. 99.*

As a Leader and Judge.—When Joseph Walton became a judge, Hamilton took silk, and till his promotion to the Bench there was scarcely an action of commercial importance in which he was not engaged. It is not easy to be amusing about charter-parties and bills of lading, but even to these prosaic documents Hamilton could

impart a fascination. Many were the great forensic combats he waged against his most formidable opponent, Thomas Edward Scrutton, an equally great lawyer, but not quite so witty, and who ere long was to follow him on to the Bench. As a judge, Hamilton established a record for the rapid despatch of business. Never once as a puisne did he reserve judgment. Although his judgments were at times a trifle long, they were models of lucidity and punctuated with caustic comment. In *Attorney-General* v. *Reynolds* (104 L.T. Rep. 852), a complicated case as to common rights in the New Forest, he had to consider whether a particular structure, sometimes called a "garden house," sometimes a "bungalow," and sometimes a "cottage," was a dwelling-house in respect of which certain rights could be claimed. In reading the judgment the student's interest is not lessened when in the midst of much technical detail he alights upon the following pleasant touch: "In summer time, with a house full of guests, I have no doubt that a bachelor guest might consider himself very tolerably lodged there; I think it is possible, in an emergency, even a manservant might consent to occupy it." In a later case, where a schoolmaster unsuccessfully sought to maintain an action for certain words alleged to have been spoken of him, Lord Sumner, as he had now become, said that "if a change of the law is desired, it is from the Legislature, as it was in 1891, that relief must come. It could be simply obtained . . . by enacting that a schoolmaster should be deemed a woman within 54 & 55 Vict., c. 51, S. 1!"—*L.T., 1939, p. 99.*

All in Public.—At the Manchester Assizes recently, Mr. Justice Croom-Johnson, after condemning a man to six months' imprisonment, cancelled the sentence on further reflection and bound him over. "Although I could have altered your sentence behind the scenes," he said, "I thought it better that you should come before me in public and that I should indicate why I am doing that which I am about to do." Some judges prefer to be merciful by stealth, others have mercy secretly thrust upon them. Of the former, Mr. Baron Martin, after passing a severe sentence would sometimes modify it in favour of the prisoner before signing the calendar. Of the latter, that William O'Brien whose behaviour on the Irish Bench aroused so much criticism used to pass the most erratic sentences, sometimes ferocious, sometimes sentimentally lenient. Some of the more farcically heavy punishments inflicted by him appeared upon the Crown Book with the spoken word discounted by as much as 80 per cent.—*S.J., 1939, p. 638.*

Behind the Scenes.—In the sentencing of prisoners, Mr. Justice Day had a system all his own. The heavy punishments he distributed

in open court struck terror into the hearts of the members of the criminal classes listening in the public gallery. Then, having produced the desired effect of frightening them out of their wits, he would revise his sentences without any publicity when he came to sign the calendar. Once public indignation was thoroughly roused when at Carlisle Assizes he condemned a man to five years' penal servitude for stealing a waistcoat. " Faith," said an Irish member of the Bar, " if the fella had stolen a suit of clothes he would have hanged him." The storm reached the House of Commons and the Home Secretary was asked a question about this exploit of Day, J. To everyone's surprise he answered : " It is *not* a fact that John Jones was sentenced to five years' penal servitude for stealing a waistcoat." There was consternation in the House as the questioner had been in court at the time. Then the Home Secretary continued : " I hold in my hand the calendar, and it appears that John Jones was sentenced to six months' imprisonment."—*S.J., 1939, p. 638.*

Home-made Wills.—All lawyers are at some time or another confronted with the layman who demands to know why he should pay to have a will drawn up for him when he can do it perfectly well himself and save his guineas. " I am certainly capable," he says, " of stating clearly what I wish to happen to my money." For such the case of Re *Smithers* : *Watts* v. *Smithers and Others* (The Law Journal, August 5, 1939, p. 101) is useful ammunition. The testatrix obtained a printed will form, and when her "securities" had been converted into cash, she made bequests of two-thirds of the proceeds, and the " remainder of the money." She did not know upon what a quaking bog of judicial interpretation she was walking. " Securities " has a primary and a legal meaning, so that there was no doubt that certain money belonging to the deceased passed under that heading. But the testatrix also possessed shares in industrial companies. Could it be said that those stocks and shares were included in the term " securities "? Crossman, J., held that they could not, and to include them would only be guessing the testatrix's intention. It is no disrespect to the learned Judge to say that had he permitted himself to guess he would almost certainly have come to the opposite conclusion, especially in view of Re *Scorer : Burtt* v. *Harrison* (94 L.J. Ch. 196). The testatrix was making her own will, and as she almost certainly did not know the strict meaning of the word " securities " she could only have used it in the colloquial sense. Those interested in her estate have now had to pay many times what she originally saved in lawyers' fees.—*L.J., 1939, p. 108.*

The Great Seal.—In view of the forthcoming visit of the Lord Chancellor to Canada, the announcement at p. 644 of last week's issue that His Majesty the King has appointed Commissioners to have the care and custody of the Great Seal while Lord Maugham is absent from the Kingdom, is a remainder of the fact that the Great Seal, to which an almost mystical significance attaches as the sign and symbol of the highest authority, cannot be taken outside the realm, seeing that it may at any time be required to be used. With its custody, we naturally associate the Lord Chanceller for the time being, and indeed its transfer to him invests him with the manifold powers attaching to his high office. A recent writer tells us that in early times, the Lord Chanceller was the King's Chaplain and the Keeper of his conscience, and remains the Keeper of the Great Seal. Considering its official importance, the Great Seal has always been carefully conserved, though not always in the precise fashion waggishly asserted by Dickens who made one of his characters declare that it was guarded night and day by two men in bag wigs and with drawn swords. Even all the care bestowed upon its safe custody has not, however, always conferred immunity upon it, for at least on one occasion it was stolen from the house of the Lord Chancellor. In an old report relating to the Court of Chancery occurs this curious item: "For sixteen yards of woollen cloth at 8 *s*. a yard to use about the Great Seal at the time of sealing, for one whole year, £6 3*s*." When a new Great Seal is made, the old one is "damasked", that is, tapped slightly with a hammer, which is assumed to deprive it of its former virtue, and then it becomes the perquisite of the Lord Chancellor for the time being.—*S. J., 1939, p. 645.*

BOOK REVIEWS.

THE WORKING CONSTITUTION OF INDIA, by S.M. Bose, M.A., LL.B. (Cantab.). Published by Oxford University Press, B. I. Building, Nicol Road, Bombay. Price Rs. 20.

This is only a commentary on the Government of India Act, 1935, as the sub-title of the book shows. The Act is of great importance to the practising lawyer, to the student of Indian Constitutional History and to politicians and legislators. Each of these may have different needs and desire a different type of commentary. The practising lawyer may require a citation of cases decided by the Judicial Committee on similar questions arising from the Canadian and Australian Constitutional Statutes. The student may require historical treatment and the politician and legislator may not require much of either for

his limited purposes. Many Editions of the Act with and without much commentary are bound to be brought out to serve all three groups in varying degrees. This book is intended primarily for the lawyer but the other two groups will find it useful. A commentary may run into minute details of decisions and become diffuse or may deal with principles and furnish guidance for the student and lawyer without running into any great detail. The commentary of the author is sharp and pointed. It is needless to add that the neatness of the printing assists in making the book attractive, notwithstanding a few errors here and there.

A supplement of the Orders in Council may be required to complete the usefulness of the book for the lawyers in particular.

THE LEGAL PRACTITIONERS ACT with INDIAN BAR COUNCILS ACT, 1926, by Kshitish Chandra Chakravarti, M.A., B.L., Advocate, Federal Court, Delhi, Fourth Edition, Revised and Enlarged. Published by M.C. Sarkar & Sons, Ltd., 14, College Square, Calcutta. Price Rs. 3-8-0.

We have great pleasure in acknowledging the receipt of the commentaries on the Legal Practitioners' Act by Mr. Chakravarti. This is the latest commentary on the enactment. The book opens with an introduction which gives a historical account of the law on the subject from the earliest times. The various enactments bearing on the subject from time to time in the several provinces are noticed and their effect summarised in the introduction. Then follow the provisions of the Act with a full commentary giving all the decisions in their appropriate places and explaining the scope of the sections. The appendices give the other enactments bearing on the topic, the most important of which is the Indian Bar Councils Act. The rules relating to legal practitioners framed by the High Courts are also given by way of appendices. Thus no effort has been spared to make the book a comprehensive guide on the subject. We hope that the book will meet with the popularity which it deserves.